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In The

Supreme Court of the United States

October Term, 1992

WILLIAM N. YEAGER, JR. and
TIMBES & YEAGER, INC.,

Petitioners,

v.

BILLY JOE CAMP,

Respondent.

**Petition For A Writ Of Certiorari
To The Supreme Court Of Alabama**

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondent, Billy Joe Camp, respectfully requests that the Court deny the Petition for a Writ of Certiorari to review the decision of the Supreme Court of Alabama rendered on July 2, 1992.

STATEMENT OF JURISDICTION

This Honorable Court should not exercise jurisdiction in this case because the Petitioner has not propounded an important question of federal law which

should be settled by this Court, nor has Petitioner presented to the Court a federal question that conflicts with the decision of another state court of last resort or which has been decided in a way that conflicts with applicable decisions of this Court. Sup.Ct. R.10.1.

STATEMENT OF THE CASE

Petitioner's statement of the case is incomplete. Respondent adopts the assertions of the Petitioner while setting forth additional facts previously omitted.

From 1980 through 1982, Billy Joe Camp (hereinafter "Camp"), was President of the Alabama Public Service Commission. During that period, there were three rate increases granted to Alabama Power Company. Camp, as Commission president, voted against each and every rate increase (R.57). All three rate increases were granted pursuant to orders entered by the Alabama Supreme Court (R.57). Over three years after leaving the Public Service Commission, Camp's consulting firm entered into agreements with Georgia Power Company, a separate entity, to perform certain consulting work regarding economic development, labor relations, public relations and regulatory affairs pertaining to nuclear generation (R.41-42).

In the Fall of 1990, Camp was a Democratic nominee for the office of Secretary of State in Alabama. Perry Hand was his opponent. William N. Yeager, Jr., Petitioner (hereinafter "Yeager"), was the media consultant to the Hand campaign (R.31). Jack Edwards, a former Republican Congressman, was the chairman of the Hand campaign. Edwards was also a member of the board of

directors for the Southern Company, the utility holding company which includes both Alabama Power Company and Georgia Power Company (Edwards' depo. 13).

Yeager was completely responsible for creating the political ad referred to as the Cemetery Ad. This ad aired from October 2, 1990 until October 9, 1990, on all major television stations in the State of Alabama. The text of the Cemetery Ad as it aired is reproduced below:

> [Perry Hand]: **Since becoming Secretary of State, I've been working to keep these folks from voting.**
>
> [Voice over]: **While Perry Hand's been fighting to clean up the voters list and curb election fraud, what's his opponent done?**
>
> **When Billy Joe Camp was president of the Public Service Commission, *we got hit with three rate increases. As a reward, Georgia Power paid him* over 700 thousand dollars in consulting fees. A clear choice, Perry Hand, a tough secretary of state who's cracking down on corrupt politics.**

(R.35). Emphasis added.

Yeager asserts that the ad was based upon information that had first appeared in *Bill Shipp's Georgia*, an Atlanta political newsletter (R.37). Similar information was republished in an *Associated Press* report of the *Montgomery Advertiser* (R.36). Neither of these two publications mentioned any rate increases that occurred during Camp's tenure on the Public Service Commission.

The text of the ad as aired was not the first draft. Yeager had previously revised the ad after receiving

information from the Hand campaign that Camp was not responsible for the rate increases (R.38). The previous text of the Cemetery ad included the following language:

> [Perry Hand]: **Since becoming Secretary of State, I've been working to keep these folks from voting.**
>
> [Voice over]: **While Perry Hand's been fighting to clean up the voters list and curb election fraud, what's his opponent done?**
>
> **As president of the Public Service Commission, *Billy Joe Camp hit us with three rate increases. As a reward, Georgia Power paid him* over 700 thousand dollars in consulting fees. A clear choice, Perry Hand, a tough secretary of state who's cracking down on corrupt politics.**

(Yeager depo. Ex. 8). Emphasis added.

Thus, at the time of the revision, Yeager was aware that Camp was not responsible for the rate increases, but rather the increases were the result of orders of the Alabama Supreme Court (R.38). This demonstrates that the ad, implying Camp was rewarded for the rate increases with consulting contracts, was known to be false by Yeager. Additionally, before the ad was aired, a facsimile copy of the script for the ad was sent to Jack Edwards, the Hand campaign chairman. Edwards, a member of the board of directors of the Southern Company, told Yeager that he felt "very uncomfortable with the commercial, and I urged him not to use it." (Edwards' depo. 35). Edwards told Yeager that he knew of nothing personally which was illegal or improper in the relationship between Georgia Power and Mr. Camp (Edwards' depo. 35). What made Edwards uncomfortable about the ad was that the

language chosen "suggests some impropriety." (Edwards' depo. 63). Edwards requested that his name not be used in connection with this ad (Edwards' depo. 39).

Furthermore, candidate Hand also had a discussion with Yeager, prior to the airing of this ad, with respect to reservations Hand had concerning the language used in the ad. Hand voiced his concern to Yeager that the words "as a reward" could be misinterpreted to mean that Camp had done something illegal or improper (Hand depo. 50). Yeager likewise led Hand to believe that Jack Edwards, the campaign chairman, had approved this ad (Hand depo. 56).

At the time the ad aired Hand was trailing widely in the polls. Yeager acknowledges that Edwards urged him not to run the ad, but Yeager was of the view that this was "the best ad that we could produce at that time to try to help our candidate win the election, move the numbers." (Yeager depo. 67). Yeager agrees that there was a negative connotation intended for the Camp ad, and that this connotation would affect Camp's reputation (Yeager depo. 62).

On October 3, 1990, the day after the ad first appeared on state wide television, *The Huntsville Times* ran a newspaper article entitled, "Hand Accuses Camp of Taking 770 Thousand For Utility Rate Hikes." (Yeager depo. Ex. 11).

A certified letter was sent to Yeager on October 16, 1990, demanding a retraction of the ad (Yeager depo. 81). No such retraction has ever been issued by Yeager.

On November 6, 1990, Camp instituted this libel action against Yeager and other Defendants. On October 4, 1991, the trial court granted Summary Judgment on behalf of Petitioner Yeager. Camp appealed the granting of Summary Judgment to the Alabama Supreme Court. On appeal, the Alabama Supreme Court reversed the lower court's Summary Judgment and remanded the case for trial in its Order of July 2, 1992. The Petition for Writ of Certiorari followed.

REASONS FOR DENYING THE PETITION

There is no special or important reason for this Court to entertain this petition for writ of certiorari. The Alabama Supreme Court has reversed an entry of summary judgment, on an issue which involves a federal question, but not in a way that conflicts with the decision of another state court of last resort or of a United States Court of Appeals, nor does the decision conflict with applicable decisions of this Court.

I. THE ALABAMA SUPREME COURT'S HOLDING IS CONSISTENT WITH THE PRIOR DECISIONS OF THIS COURT.

The Alabama Supreme Court below correctly applied the standards imposed by this Court in its decisions interpreting the First Amendment. Petitioner merely disagrees with result reached by the Alabama Court, not with the standard of review utilized. This Court has historically not granted certiorari to review evidence and discuss specific facts. *United States v. Johnston*, 268 U.S.

220 (1925). The Petitioner in this case merely seeks an additional review of the evidence on the issue of actual malice. Such a request does not meet this Court's standards concerning certiorari.

The Petitioner alleges that the Alabama Court's ruling below is in conflict with this Court's holding in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1(1990). The assertion is made that the Cemetery Ad is not sufficiently factual such that it is susceptible of being proven true or false. This claim is meritless and ignores the lower court's ruling below. It likewise ignores the plain meaning of the words carefully chosen by Yeager, the professional media consultant.

In *Webster's New World Dictionary Compact School and Office Edition*, 368 (1989), the word reward is defined as "something given in return for something done." In *Roget's College Thesaurus*, 481 (1985), common synonyms for the word "reward" include terms such as "recompense", "compensation", "payment" and "payoff". If one substitutes the synonym "payoff" for the word "reward" in the Cemetery Ad, the applicable text now reads:

> **When Billy Joe Camp was president of the Public Service Commission, we got hit with three rate increases. As a *payoff*, Georgia Power paid him over 700 thousand dollars in consulting fees.**

Thus, the plain meaning of this ad is inescapable. It implies that Camp received the consulting fees as compensation or a payoff for the rate increases. This is precisely what the Alabama Court below held in its ruling that the ad's plain meaning would be understood as

imputing corrupt conduct to Camp (A-6). Certainly an implication that Camp had engaged in criminal or corrupt conduct is an event that is sufficiently factual as to be objectively verifiable. Such conduct is verifiable as it is done with regularity in criminal cases charging public officials with bribery.

The Alabama Court's holding is consistent with this Court's holding in *Milkovich* and its analysis of this issue as concerns the effect of a statement upon the recipient. This Court stated:

> **The dispositive question in the present case then becomes whether or not a reasonable factfinder could conclude that the statements in the Diadiun column imply an assertion that Petitioner Milkovich perjured himself in a judicial proceeding. We think this question must be answered in the affirmative . . . .**
>
> **We also think the connotation that Petitioner committed perjury is sufficiently factual to be susceptible of being proved true or false.**

Milkovich v. Lorain Journal Co., 497 U.S. 1, 110 S.Ct. 2695, 2707 (1990).

The facts in this case are directly in accord with *Milkovich*. Here the viewer of the Cemetery Ad could reasonably conclude that the statements imply that Camp was guilty of criminal conduct, namely bribery. This connotation that Camp is guilty of bribery is analogous to the connotation that the Petitioner in *Milkovich* was guilty of perjury.

Yeager simply attempts to retreat from his own carefully chosen words, "as a reward," suggesting now that

he was implying only that Camp was rewarded for his *"service"* on the Public Service Commission. If that had been the true implication, it would not have been necessary to mention the rate increases. Likewise, his revision of the ad further suggests that Yeager intended to link the later consulting contracts to the earlier rate increases.

Yeager also asserts in his Petition that "no reasonable viewer could have concluded that 'as a reward' implied a prior agreement to employ Camp in exchange for rate increases and, hence, signal bribery or corruption (Petition 6-7)". Yeager's assertion is meritless. The Alabama Court below disagreed and for good reason. Jack Edwards specifically urged Yeager not to run this ad because it "suggested some impropriety to him" (Edwards depo. 63). Clearly if the script of the ad implied this to the chairman of the Hand campaign, it would have a similar impact on an ordinary viewer. Likewise, a similar concern was voiced by candidate Hand, who cautioned Yeager about a possible misinterpretation of the ad. (Hand depo. 50). Additionally, on the day after the ad was aired, an Alabama newspaper, *The Huntsville Times*, ran a story with the headline reading "Hand Accuses Camp of Taking 770 Thousand Dollars For Utility Hikes." (Yeager depo. Ex. 11). Thus, there was clear and convincing evidence that the ad would be interpreted by a reasonable viewer as implying corruption. This is in accord with the Alabama Court's ruling below (A-6).

II. THE ALABAMA SUPREME COURT CORRECTLY APPLIED THE CLEAR AND CONVINCING EVIDENCE STANDARD ON THE ISSUE OF ACTUAL MALICE.

The writ should not issue in this case because the Alabama Supreme Court has correctly applied the standard of review as espoused by this Court in its decision in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). *Anderson*, like the case at bar, involved the standard of review in a defamation case at the summary judgment level. This Court held:

> **In sum, we conclude that the determination of whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to case. This is true at both a directed verdict and summary judgment stages. Consequently, where the *New York Times* "clear and convincing" evidence requirement applies, the trial judge's summary judgment inquiry as to whether a genuine issue exists will be whether the evidence presented is such that a jury applying that evidentiary standard could reasonably find for either the plaintiff or the defendant. Thus, where the factual dispute concerns actual malice, clearly a material issue in a *New York Times* case, the appropriate summary judgment question will be whether the evidence in the record could support a reasonable jury finding either that the Plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not.**

Anderson v. Liberty Lobby, Inc., 477 U.S. 255, 256 (1986).

This is precisely the test as enumerated by the Alabama Supreme Court below. The Alabama Court noted that the First Amendment requires that an alleged defamatory statement concerning a public official must be made with actual malice. Actual malice, as defined by this Court in *New York Times v. Sullivan*, 376 U.S. 254 (1964), means the statement was made with "knowledge that it was false or with reckless disregard of whether it was false or not."

The court below appealed the evidentiary standard on the issue of actual malice as follows:

> **We have looked at the evidence in the record, viewing the evidence in the light most favorable to the non-movant, Camp, and allowing all reasonable inferences from that evidence, to determine whether the trial court correctly found that Yeager and Timbes & Yeager, Inc. were entitled to a summary judgment based on the issue of actual malice. . . .**
>
> **We have assessed the trial judge's view at the above matter within the framework of the "clear and convincing" standard. We are now compelled to conclude that the trial judge erred when he granted Yeager and Timbes & Yeager's Motion for Summary Judgment.**
>
> **We are satisfied that Camp has presented evidence, that, if believed by a jury, would be sufficient to support a finding, by clear and convincing evidence, that Yeager knew that the statement, as understood, was false. (A-6).**

The Petitioner does not argue that the Alabama Supreme Court failed to use the *New York Times v. Sullivan* standard on the issue of actual malice. Likewise, the

Petitioner does not argue that the court employed an inappropriate test for the sufficiency of the evidence as espoused in *Anderson*. Rather, the Petitioner merely suggests that the court reached the wrong result while employing the proper constitutional standards of review.

Petitioner seeks a writ of certiorari for the purpose of having this Court re-examine the record and reach a different result. Certiorari is an inappropriate vehicle for such a factual review. There has been no verdict entered in this case, only a reinstatement of a state law defamation action. No constitutional error has occurred to date.

Yeager seeks to insulate himself from an action for defamation based solely upon his "honest belief" that the ad which he created was true. This Court has rejected the notion that the inquiry ends based on the self-serving statement of the Defendant. In *St. Amant v. Thompson*, 390 U.S. 727 (1968), this Court noted:

> **The defendant in a defamation action brought by a public official cannot, however, automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith. Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found where there**

are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.

St. Amant, Supra 732.

Here the Court below has held that there were obvious reasons for Yeager to doubt the truth of this ad. Yeager had received documents from the Hand campaign which indicated that the Alabama Supreme Court, and not Camp, was responsible for the rate increases. Additionally, Yeager was warned by Edwards that there was no impropriety concerning the consulting contracts and Edwards urged Yeager not to run the Cemetery Ad. Yeager likewise ignored warnings from Hand.

The Alabama Supreme Court has not ruled as a matter of law that Yeager was guilty of actual malice in creating and publishing the Cemetery Ad. Rather, the court has only held that the Plaintiff has put forth clear and convincing evidence which, if believed by a jury, would warrant a verdict against Yeager for defamation (A-6). The court has simply held that a jury issue has been presented. There is no constitutional error in the lower court's decision construing the record in this case.

CONCLUSION

The Petition for writ of certiorari should be denied. The Petitioner simply does not raise a federal question appropriate for review by this Court.

Respectfully submitted,

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